BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

The Courts below erred in ruling that Milcor and Blackburn were not required to plead and prove that they had filed a statement of their claims within sixty days after they had ceased to furnish materials to the Newtown project, as a condition precedent to a suit against McGraw and Aetna upon the surety bond involved herein. Under *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, the Courts below were required to apply the rule of law formulated by the decisions of the Connecticut court of last resort, to wit, that the absence of such an allegation was fatal to the respondents' claims upon the bond.

A

The initial statute for the protection of laborers and materialmen, in the form of a Mechanic's Lien Law for private construction, was enacted by the State of Connecticut in 1836. (*Barlow Bros. Co.* v. *Gaffney*, 76 Conn. 107, 109.) In 1855 there was first enacted, as a part of the Mechanic's Lien Law, a provision which required a laborer or materialman to file, with the owner of the building, a notice of his claim within sixty days after the labor had been performed, or the materials had been furnished. (*Barlow Bros. Co.* v. *Gaffney, supra*, at p. 110.) That sixty day provision has remained an integral part of the Connecticut law governing the enforceability of mechanic's liens down to this very day. (Title 53, Chapter 274, Section 5107, Gen. Stat. 1930.)

In common with the courts of other states, the Connecticut courts had ruled, at a very early date, that a mechanic's lien could not attach to, or be enforced against, the public property of a state, county, or municipality. (*National Fireproofing Co.* v. *Huntington,* 81 Conn. 632; *Pelton & King* v. *The Town of Bethlehem,* 109 Conn. 547.) The existence of that doctrine created a manifold injustice, since it deprived laborers and materialmen upon public works of any protection whatsoever. In the language of Connecticut's Supreme Court in *Pelton & King* v. *The Town of Bethlehem,* 109 Conn. 547, 552:

> "Therefore laborers and materialmen upon public buildings and works were relegated to recovery from the contractors alone, and exposed to a like difficulty or impossibility of obtaining payment from him which inspired the enactment of mechanic's liens statutes, but were deprived of the means of obtaining security which was available, under those statutes, to those furnishing labor and materials in construction work for private owners."

To correct that injustice, and place laborers and materialmen on public and private contracts upon a substantially equal footing, Connecticut, as well as other states, enacted statutes which required the execution and delivery of a surety company bond by a contractor who undertook the construction of a public work, the bond constituting the source of the protection which the real property provided to those covered by the mechanic's lien statutes (*Pelton & King* v. *The Town of Bethlehem,* 109 Conn. 547). Evidencing the legislative intent to accord laborers and materialmen upon public and private contracts an *identical* measure of protection, the initial statute directing the execution of a surety company bond upon public works, adopted in 1917, was enacted *as a part of*

the Mechanic's Lien statute. (See Title 53, Chapter 274, Section 5109, Gen. Stat. 1930.) Under the revision of the General Statutes in 1930, Chapter 274 of Title 53, entitled "Mortgages and Liens", contained Section 5106, providing for the filing of a mechanic's lien within sixty days after the labor had been performed or the materials had been furnished, Section 5107, providing for the service of a notice of claim upon the owner within that period of 60 days and Section 5109, providing for the filing of a claim upon a surety bond issued for a public construction *within sixty days after the labor had been performed, or the materials had been furnished.* In 1935, Section 5109 became Section 1594c, still *as a part of* Title 53, Chapter 274, under the heading of "Mortgages and Liens".

For a period of twenty years, *i.e.*, from 1917, the date of the original act, to 1937, the date of the enactment of Section 540d creating a Department of Public Works in the State of Connecticut, *it is undisputed that all public and private construction work in the State of Connecticut had been placed upon an identical basis.* During that period of time, laborers and materialmen upon public and private work were accorded exactly the *same* measure of protection; in the case of private work, a lien upon the real property, *if the notice of claim were served upon the owner within sixty days;* and, in the case of public property, a claim upon the surety company bond, *if the notice of claim were similarly served upon the officer requiring the bond within the same sixty day period.*

The legal consequences of the failure to act within the specified sixty days were precisely the same. If a laborer or materialman upon a private project failed to serve his notice of claim within the sixty day period, his *right to a lien was lost* (*Burritt Company* v. *Negry,* 81 Conn. 502, 505). So, too, in the case of a laborer or materialman upon a public project, the right to enforce

the bond *was likewise lost,* if he failed to file his statement of claim with the officer to whom the bond had been delivered within the sixty days prescribed by the statute.

In its opinion, the Trial Court ruled that a materialman's right to recover upon a surety company bond, under Section 1594c, was not conditioned upon the service of a notice of claim. The Court declared "that sixty days notice is not a condition precedent to suit upon the obligors of a bond under Section 1594c", and that, therefore, "it follows that the plaintiff's first ground of motion is without merit" (R., 83).

The District Court's conclusion, as the first ground for its decision, was so completely in conflict with the decision by Connecticut's highest Court in *New Britain Lumber Co.* v. *American Surety Co.,* 113 Conn. 1, 154 A. 147, that it was rejected by the Circuit Court with the following comment:

> "This conclusion appears foreclosed, however, by New Britain Lumber Co. *v.* American Surety Co. of New York, 113 Conn. 1, 154 A. 147, which held squarely that a complaint seeking recovery against the surety upon a bond given to a town under this statute must be dismissed for lack of allegation by the materialman that it had filed its claim within the sixty-day period." (149 Fed. [2d] 301, 303.)

B

We now turn to a consideration of the situation which obtained in 1937, when the Connecticut Legislature enacted a statute creating a Department of Public Works, Section 540d, 1937 Supp. to Gen. Stat., thereafter known as Section 786e, 1939 Supp. to Gen. Stat. Subdivision r of that section provided for the delivery of a surety company bond in connection with the execution of contracts under the jurisdiction of the Department of Public Works.

The petitioners contended in the Trial Court that the bonds required by Section 786e (r) were subject to the provisions of the more inclusive and all-embracing provisions of Section 1594c which, by its terms, applied to the construction "of *any public building*" in the State of Connecticut and, more particularly, were subject to those provisions of Section 1594c which require the service of a statement of claim within the prescribed sixty day period. Upon this phase of the petitioners' argument, the Trial Court declared as the second ground of decision, that "Section 786e operates as an implied repeal of the 1935 Act," (fol. 254) and that, as a result, no notice of any kind was required of materialmen or laborers under the later statute. It was this second ground which was approved and adopted by the Circuit Court.

In the formulation of that ruling the Courts below overlooked the significance of a decision by Connecticut's court of last resort, to wit, *Conn. Rural Roads Improvement Ass'n* v. *Hurley,* 124 Conn. 20. In that case, the Supreme Court of Connecticut ruled that Section 540d, which created the Department of Public Works, the very statute involved in the instant case, did not abolish or in any way affect other existing departments dealing with public structures, such as the State Highway Department, the Merritt Highway Commission, the Hartford and East Hartford Bridge Commission, the Airport Commission, the Commission on Sculpture, the Commission exercising jurisdiction over the State Dock at Guilford, the Board and Harbor Commissioners of New Haven Harbor, the Soldiers' Home Commission, and various other State Commissions dealing with public buildings.

It is plain, therefore, that the enactment of Section 540d did not, directly or by implication, repeal many of the existing statutes which dealt with public works. More specifically, Section 1594c was not, and could not be,

affected thereby. For example, the jurisdiction of the State Highway Commission was unimpaired, as the Court specifically ruled in *Conn. Rural Roads Improvement Ass'n* v. *Hurley, supra.* Since Section 529c of the State Highway Commission Act required the State Highway Commissioner, in contracting on behalf of the State, to obtain from the contractor a bond *"conditioned as provided in Section 1594c"*, it is obvious that the 1935 statute could not possibly have been repealed by the later act. Similarly, Section 1594c would also control all of the public works which, according to the Connecticut Supreme Court in the *Hurley* case, *supra,* were completely unaffected by the statute creating the Department of Public Works.

C

At the January 1941 session of the Connecticut Legislature, *both Section 1594c and Subdivision (r) of Section 786e were repealed,* the first by Section 697f of the General Statutes, 1941 Supp. and the second by Section 370f of the General Statutes, 1941 Supp. Had Section 1594c been impliedly repealed by Section 786e when the latter was originally enacted, as the Trial Court ruled below, there would have been no necessity for the specific repealer in 1941. The most conclusive and significant of the Legislature's activities in 1941, however, *was its substantial re-enactment, upon the repeal of both prior sections, of Section 1594c, as Sections 694f and 695f* of the 1941 Supp. to the General Statutes.* Those sections, appended

* *Section 694f: Bonds for protection of employees and material men on public structures.*

Before any contract exceeding one thousand dollars in amount for the construction, alteration or repair of any public building or public work of the state or of any subdivisions thereof is awarded to any person, such person shall furnish to the state or such subdivision a bond in the amount of the contract which shall be binding upon the award of the contract to such person, with a surety or sureties satisfactory to the officer awarding the contract, for the protection of persons supplying labor or materials in the prosecution of the work provided for in such contract for the use of each such person. Nothing

at length in the footnote hereto, were reenacted as a part of Title 53, Chapter 274, of the Connecticut Statutes, under the heading "Mortgages and Liens", *the identical title, chapter and heading containing Section 1594c and its predecessor statutes from the date of its original enactment in 1917.*

The new sections bear the same caption as 1594c and its predecessors, to wit, **"Bonds for protection of employees and material men on public structures"**. They contain exactly the same phraseology as Section 1594c in its applicability to "the construction • • • of *any* public building" in the State of Connecticut. In only two respects does the new statute differ from its predecessor, both of which have been borrowed from Section 786e(r): firstly, it applies to all contracts for public

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in sections 694f to 696f, inclusive, shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to the bond therein referred to.

Section 695f: Suit on bond; when and how brought.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under the provisions of section 694f and who has not been paid in full therefor before the expiration of a period of sixty days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing such payment bond shall have a right of action upon such payment bond upon giving written notice to such contractor within sixty days from the date on which such person performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence.

(b) Every suit instituted under this section shall be brought in the name of the person suing, in the superior court for the county where the contract was to be performed, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract.

(c) The word "material" as used in sections 694f to 696f, inclusive, shall be construed to include the rental of equipment used in the prosecution of work provided for in such contract.

construction involving more than $1,000 and secondly, it permits a direct suit against the surety upon the bond, without even the necessity of bringing the action in the name of the state. *The identical sixty day provision contained in Section 1594c, however, was reenacted, expressly applicable to every contract for the construction of a public work in the State of Connecticut* and requiring the service of a notice upon the contractor, instead of the state, within the prescribed period of time.

The action of the Connecticut Legislature in 1941, of vital importance in illuminating the intent of the Legislature at the time of its enactment of the two prior statutes (*Connecticut Rural Roads Improvement Ass'n* v. *Hurley*, 124 Conn. 20, 34), is a striking confirmation of the validity of the views presented by the petitioners in the Courts below.

Under the decision of the Courts below, the following situation would exist: From 1917 to 1937, materialmen and laborers upon all public and private contracts were subject to the same sixty day condition precedent to the enforcement of their claim. From 1941 to date, precisely the same condition is true. From 1937 to 1941, however, according to the Court below, the Legislature had deliberately created a disparity for which no reason is suggested, a disparity which subjected materialmen and laborers on private contracts and public contracts, other than those executed by the Department of Public Works, to a sixty day condition, whereas materialmen and laborers of contractors with the Department of Public Works possessed seventeen years within which to assert a claim. That result is predicated upon the alleged inconsistencies and repugnancies between the two prior statutes, the supposed existence of which was effectively demolished by the Legislature in its enactment of a statute in 1941 which is, in effect, a substantial reenactment of Section 1594c, as well as a combination of both.

D

It is a fundamental principle in the construction of statutes that the Legislature, in the enactment of a statute, was fully cognizant of existing acts upon the subject and did not intend the repeal of the earlier by the later, where no specific repealing clause was adopted. "It is a legal presumption that the Legislature in framing the charter, was well aware of the existing provisions of the statute, and a further presumption that there was no intention to enact conflicting provisions * * *". (*State ex rel. Pape* v. *Dunais*, 120 Conn. 562, 566.) "The presumption is that the Legislature, in enacting that law, did it in view of existing relevant statutes, *and intended it to be read with them, so as to make one consistent body of law.*" (*Hartley* v. *Vitiello*, 113 Conn. 74, 82.)

Equally well established is the canon of construction, repeatedly reiterated and applied, that a repeal by implication is never favored and will be avoided, whenever possible. "Repeals by implication are not favored and will *never* be presumed where the old and new statute may well stand together". (*State ex rel. Wallen* v. *Hatch*, 82 Conn. 122, 125). It is the duty of a Court to coordinate and harmonize statutory provisions which appear to be in conflict and to adopt a construction which will validate, rather than invalidate, the legislation subject to review. So, too, the courts will never invoke a mode of construction which entails absurd and unreasonable consequences, where a perfectly reasonable interpretation may be accorded to the statutes involved, conforming in every way with the remedial purposes to be effectuated. "When one construction leads to public mischief which another construction will avoid, the latter is to be favored unless the terms of the statute absolutely forbid." (*Bridgeman* v. *City of Derby*, 104 Conn. 1, 8.) "It is

to be noted that the Act appended in the footnote repeals a number of statutory provisions, but does not expressly repeal Section 5425, *nor does it contain any general repealing clause.* There is no repugnancy between the statutes; and we think there is no repeal by implication. Such repeals are not favored, and when an earlier and later statute can be reconciled, *it is the duty of the Court to so construe them that the latter may not operate as a repeal of the former.*" (*Costa* v. *Reed,* 113 Conn. 377, 385, citing many cases.)

That the two statutes involved in the instant case may be reconciled and read together was established by the case of *Southern Surety Co.* v. *Standard Slag Co.,* 117 Ohio St. 512, 159 N. E. 559, a case on all fours with the instant one. The Circuit Court, in its opinion, refused to follow the process of reconciliation adopted in the aforementioned case. On the contrary, it imputed to the Legislature an intent for which no foundation, support, justification or rationale can be ascribed, an intent to create artificial differentiations and a manifestly absurd liability, all in contravention of well-established Connecticut principles of statutory interpretation. Its conclusion is allegedly justified by the literal sense and precise letter of the statutory language, notwithstanding the injunction of the Connecticut Courts that:

> "The intent of the lawmakers is the soul of the statute, and the search for this intent we have held to be the guiding star of this court. *It must prevail over the literal sense and the precise letter of the language of the statute.*" (*Bridgeman* v. *City of Derby,* 104 Conn. 1, 8.)

CONCLUSION

The Writ of Certiorari should be granted as prayed for.

Dated, August 16th, 1945.

Respectfully submitted,

JOSEPH LOTTERMAN and
LOUIS A. TEPPER,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 348.

F. H. McGRAW & COMPANY INC. and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

vs.

MILCOR STEEL COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Table of Cases Cited.

Supreme Court Rules Cited.

Statutes Cited.

Reports Cited.

Supreme Court of the United States

OCTOBER TERM, 1945.

F. H. McGRAW & COMPANY INC. and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

against

MILCOR STEEL COMPANY.

No. 348.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Milcor Steel Company, by counsel, files its brief in opposition to petition for writ of certiorari herein as follows:

Statement as to Petitioners' Failure to Comply With Requirements of Rule 38.

In the District Court one judgment was entered, which awarded Milcor Steel Company (herein referred to as Milcor) the amount of its claim, with interest and costs, and which awarded another claimant, John T. D. Blackburn Inc. (Blackburn), the amount of its claim, with interest and costs (R. 619-620). From this, each of F. H. McGraw & Company Inc. (McGraw) and The Aetna Casualty and Surety Company (Aetna) appealed to the Circuit Court of Appeals, the matter and record there appearing as Civil Action File No. 368, and the Order for Mandate of that

Court (R. 670) decreed that "the judgment of said District Court be and it hereby is affirmed with costs." Two petitions for writ of certiorari have been filed here, the instant one (No. 348) by both Aetna and McGraw, seeking to obtain a review of the decree of the Circuit Court of Appeals in favor of Milcor *alone* (p. 1 of petition), but praying for relief (p. 9 of petition) that the decree of the Circuit Court of Appeals affirming the judgments obtained by *both* Milcor and Blackburn against the petitioners, be reversed; and the other (No. 347) seeking to obtain a review of the decree of the Circuit Court of Appeals in favor of Blackburn (p. 1 of that petition) and praying for relief (p. 12 of that petition) that the decree of the Circuit Court of Appeals affirming the judgment obtained by Blackburn alone against the petitioners, be reversed. Petitioners have improperly brought two separate petitions (in each of which *both* have joined) for writs of certiorari from this one judgment. While each petitioner might petition as a separate party, nevertheless, here *both* have joined in *each* petition. Nor, we submit, is this proper practice under Rule 48 of this Court, in that the purpose of that rule is to encourage consolidation of appeals and accordingly reduce the volume of papers to be presented to this Court for consideration, rather than to permit of an expansion of those papers, as has been done here. Petitioners' obvious purpose is to permit each of them to make two separate statements of facts and present two separate briefs, whereas the obvious purpose of Rule 48 is to encourage litigants to merge their statements and briefs which otherwise they might have presented separately. We respectfully submit that the procedure adopted here particularly violates the provisions of subdivision 2 of Rule 38 of this Court and that the petition at No. 348 should be denied by virtue of that fact and of the authorities therein set forth.

Counter Statement of the Matter Involved and of the Issue Presented.

We present this counter statement because petitioners' Summary Statement fails to present certain salient facts, and is argumentative rather than expository, as is the Statement of the Issue presented in the petition.

In August, 1938, petitioner McGraw was awarded a contract for the general construction of a portion of a State Hospital (R. 599) by the Department of Public Works of the State of Connecticut. McGraw, as principal and Aetna, as surety, filed a bond at that time to insure payment to materialmen, laborers and subcontractors on the job. McGraw awarded a subcontract for the plastering work to Sherman Plastering Company Inc. (Sherman) (R. 600), which company thereafter purchased various materials for its work from Milcor (R. 602) and those materials were used by Sherman on the job in question. Milcor is unpaid for those materials to the extent of a principal balance of $6,372.51. The Trial Court so found (R. 602, 617) and these essential facts have not been questioned or denied by petitioners in their petition or in their briefs in the Circuit Court of Appeals.

Milcor delivered its materials to the job between August 30, 1939 and October 17, 1939 (R. 558). On September 14, 1939 it notified McGraw by letter (R. 560) that it was about to supply material to Sherman for the job. On October 12, 1939 it notified McGraw by letter (R. 561) that during August and September it had delivered $5,419.26 worth of materials to the job. On January 18, 1940 it wrote McGraw (R. 564) sending a statement of account for $6,372.51 for completed deliveries to the job.

The bond in suit was written pursuant to the requirements of 540d(r) of the 1937 Supplement to the General

Statutes of Connecticut (printed in Appendix B) which required, on all contracts entered into by the Commissioner of Public Works, a payment bond of the general contractor and a surety for the protection of materialmen, laborers and subcontractors. The statute contained no short period of limitations, and did not require as a condition of suit the giving of any notice to the surety, to the contractor, or to the public authority, of a claim for unpaid materials or labor. Also in effect at that time was Sec. 1594c to the General Statutes of Connecticut, 1935 Supplement (printed in Appendix A) which, as will be developed later, was not applicable to contracts awarded by the Department of Public Works, but was applicable to county works, municipal works, etc. That statute likewise contained no short period of limitations, but did contain a condition to suit that notice of unpaid claims of materialmen or laborers be given *to the public authority* controlling the work within sixty days of the last delivery of material or performance of labor.

A recital of previous proceedings is not necessary to this discussion. Suffice it to say that petitioners' contention that the sixty day notice provision contained in Section 1594c should be read into 540d(r) was overruled by the District Court (R. 81-89) and by the Circuit Court of Appeals (R. 635-639) on the ground that Sec. 540d, completely covering the subject matter with which it was concerned, was exclusive of and brought about an implied repeal of, or was at least a substitute for or exception to Sec. 1594c, rather than a supplement thereto.

The only issues presented by this petition are (1) whether the question of local law thus raised is an important one, and (2) if so, whether the Circuit Court of Appeals has decided that question in a way probably in conflict with applicable local decisions.

Summary of Argument.

The petition should be denied because:

1. The Circuit Court of Appeals properly applied the law of Connecticut to the situation presented.

2. The petition presents no question of importance, the statute under discussion having been long since repealed; the question presented concerns only the parties.

ARGUMENT.

I.

The Circuit Court of Appeals Properly Applied the Law of Connecticut to the Situation Presented.

Section 540d was passed by the Legislature as a part of a broad scheme of reorganization of state works and services, one of the results of which was the creation of a Department of Public Works, which was given exclusive jurisdiction over a particular field and for which a complete administrative and procedural set-up was created by that statute. It was the intention of the Legislature to create various self-sufficient departments, including the Department of Public Works, to give power to those departments, and to leave to the previously existing laws, including Sec. 1594c, such subject matter as was not so covered.

By Special Act No. 242 of 1935, the Connecticut Legislature created a commission upon the reorganization of the departments of the State Government. That commission was charged to

> "* * * study all the functions of the State Government, ascertain * * * all duplications of service

> and effort, determine the most economical method of furnishing the present state service and recommend the abandonment, modification or consolidation of any existing departments and the creation of such new departments as may be required for the most economical operation of the State Government. * * *"

and was required to render a report to the Governor and to

> "* * * include with its recommendations drafts of proposed legislation necessary to carry out such recommendations."

The Commission enlisted the aid of various experts and rendered a lengthy and careful report to the Governor, entitled "Report of the Connecticut Commission Concerning the Reorganization of the State Departments." Its contents are a valuable and legitimate aid in ascertaining the intention of the Legislature in passing Sec. 540d. *Connecticut Rural Roads Improvement Ass'n.* vs. *Hurley,* 124 Conn. 20, 197 Atl. 90.

The report (Ch. XVIII) gives a survey of the then present organization and administration of public works, which was loosely scattered throughout sundry different bureaus, and sets forth the commission's proposal that a Department of Public Works be created and made responsible for preparing or for having prepared all plans, specifications, and estimates, *for the letting of all contracts,* and for the supervision of the execution of contracts covering the construction, remodeling and repairing of any state building involving an expenditure in excess of $1,000. The Commission considered the problem of public works as a whole, recognized the confusion and economic waste then existent due to lack of centralized authority and responsibility in respect of such works, and determined the

necessity for creation of a single self-sufficient and authoritative department to handle such matters.

To give effect to its reports, the Commission prepared proposed legislation, which was adopted by the Legislature in Sections 1 to 24 of Chapter 126 of Public Acts of 1937, which became section 540d, subsections (a) to (x) in the compilation of the 1937 Supplement. Section 18 of the Commission's proposed bill was adopted, without change, and became and is Section 540d(r), under which the bond in suit was written.

After the enactment of Section 540d, Section 1594c still remained in force, to be effective in those situations not covered by Section 540d, or by other portions of the reorganization act, for example, county and municipal works.

Petitioners' whole effort is directed to the proposition that one clause of Section 1594c should be carried over and read into Section 540d, an unrealistic position when consideration is given to the complete study of the Commission, its voluminous and careful report, and the fact that Section 540d set up an entirely new department, provided it with subject matter of jurisdiction and procedure, and, most important, created a complete scheme for protection of materialmen and laborers far more extensive than the scheme of Section 1594c. The following material differences between the bonding provisions of the two acts show clearly the intention of the Legislature that Section 540d was not merely an addenda to 1594c, but was a complete and new scheme:

a. Authority in charge—under 1594c, any state, county or municipal authority; under 540d, Commissioner of Public Works only.

b. Contracts to which applicable—under 1594c, any contract over $500; under 540d, any contract over $1,000.

c. Number of bonds required—under 1594c, one bond to cover both completion and payment; under 540d, two separate bonds, one for completion and one for payment.

d. Amount of bond—under 1594c, entirely in discretion of public authority; under 540d, each bond for no less than 50% and no more than 100% of contract price.

e. Condition of bond—under 1594c, faithful execution of contract and payment for all materials and labor used or employed in the execution of such contract; under 540d, payment for all materials and labor whether or not the same enters into and becomes a component part of the real asset.

f. Notices of claim necessary—under 1594c, within sixty days of last delivery; under 540d, none.

g. To whom notice given—under 1594c, public official in charge; under 540d, none required.

h. Amount of fund available to materialmen and laborers—under 1594c, limited to contract price less payments already made to contractor; under 540d, balance due to general contractor plus full amount of payment bond.

i. Method of recovery by unpaid materialmen or laborers—under 1594c, procure pro rata share directly from public authority which in turn sues surety; under 540d, sue directly on payment bond.

While the exact question presented has never before been passed on by the Connecticut Courts, nevertheless, the question of statutory construction involved has been correctly determined by the District Court and the Circuit Court of Appeals in following the rule announced by the Supreme Court of Errors of Connecticut to the effect that

> "If one of two enactments is special and particular and clearly includes the matter in controversy,

> whilst the other is general and would, if standing alone, include it also, and if the inclusion of that matter in the general enactment would produce a conflict between it and the special provisions, it must be taken that the latter was designed as an exception to the general provisions." Wentworth *vs.* L. & L. Dining Co. Inc. (Sup. Ct. of Errors, Conn. 1933), 116 Conn. 364, 165 Atl. 203.

Petitioners cite no cases to sustain their position that the Circuit Court of Appeals has probably wrongly applied the law of Connecticut. Much stress is laid by them upon one of the grounds of decision of the District Court which they believe to be contrary to the rule of law expressed in *New Britain Lumber Co.* vs. *American Surety Company of New York*, 113 Conn. 1, 154 Atl. 147. However, in the Circuit Court of Appeals, Milcor placed no reliance upon that particular ground and the Circuit Court of Appeals likewise passed it by, so petitioners can have no complaint on that score. The only attempt made in the petition to show that the Circuit Court of Appeals probably wrongly applied the Connecticut law to the major point of importance is by the citation of an Ohio case, *Southern Surety Company* vs. *Standard Slag Co.*, 117 Ohio St. 512, 159 N. E. 559, which, while somewhat alike to the situation presented here, is not a determination as to what Connecticut courts would rule in the present situation.

Petitioners rely on a 1941 statute (Appendix C) passed by each branch of the Legislature and signed by the Governor *after* the decision of the District Court herein, as an indication that the Legislature intended Section 540d to contain a sixty day condition of notice, since, as they claim, the 1941 Act was a substantial reenactment of Section 1594c. But the 1941 Act was in no manner a substantial reenactment of Section 1594c. The 1941 Act differs mate-

rially from Section 1594c, inter alia, in the following respects; it does away with the absolute requirement of a performance bond; it permits of direct suit against the surety; it requires notice of claim within sixty days *only* when the claimant has no direct contractual relation to the prime contractor; it requires such notice to be given to the prime contractor rather than to the public authority; it does not limit the fund available for labor and material claims to the face amount of the contract; it covers rental of equipment used on the project; it provides a period of limitation of suit on the bond of one year from date of final settlement of the contract. The 1941 Act created a new and even broader scheme of protection for materialmen and laborers, and was, in fact, the adoption, word by word, of the so-called Miller Act, 40 U. S. C. A. Sec. 270a, *et seq.* Actually, the enactment of the 1941 statute contains a fair inference contrary to petitioners' position, namely, that the Legislature thereby recognized that Sec. 540d did not contain a condition of notice either in express words or by reference, and accordingly provided it in the 1941 Act. *MacKay* vs. *Commissioner of Internal Revenue* (C. C. A. 2d, 1938) 94 Fed. (2nd) 558; *Matter of Miller*, 110 N. Y. 216, 18 N. E. 139; *Silver* vs. *Silver* (Sup. Ct. of Errors, 1928), 108 Conn. 371, 143 Atl. 240.

Petitioners lay much stress upon the course of the history of protection afforded to materialmen and laborers, and conclude that since in many states such claimants are required to file claims within a sixty day period, that provision should be read into Sec. 540d, the language of which contains no such restriction. But petitioners overlook the fact that the legislative policy was obviously to benefit and protect the materialman and the laborer, not the compensated surety. A period of limitation is a matter of legis-

lative grace to the obligor, not of right, and does not exist unless specifically granted. As the Circuit Court of Appeals has well put it (R. 639):

> "Certainly materialmen scanning the 1937 enactment would not have thought of looking back to Sec. 1594c for conditions requiring speedy performance to insure recovery on the bond."

Petitioners, as we have pointed out in our statement of facts, received ample and prompt notice of Milcor's claim. Their only complaint is hypertechnical, *i.e.*, that those notices were addressed to them rather than to the Commissioner of Public Works. Since the then applicable statute, Sec. 540d, permits direct suit against the surety, it would be absurd to require notice to the public authority, as provided in Sec. 1594c, which statute required notice to the public authority simply because the unpaid materialman had to look to that source for his money, and could not sue the surety directly.

There was no error in the ruling of the courts below, and in any event not such a plain showing of error, as to move this Court to set aside that ruling. *Palmer* vs. *Hoffman*, 318 U. S. 109, 118, 87 L. Ed. 645, 652, rehearing denied 318 U. S. 800, 87 L. Ed. 1163.

II.

The Petition Presents No Question of Importance, the Statute Under Discussion Having Been Long Since Repealed; the Question Presented Concerns Only the Parties.

Petitioners seek review of an interpretation of a statute that was in effect from 1937 to 1941. The portion of the statute before the court deals with a minor procedural point in the carrying out of construction or repair con-

tracts originating in the Department of Public Works, *i.e.*, the mechanics of protection for materialmen and laborers. The statute was intended to benefit those persons, not to protect the compensated surety. No complaint is here made that the statute did not accomplish its purpose. The question involved can in no sense be viewed as one of public importance. As a matter of fact, the express repeal of Section 540d in 1941 by a new statute giving even broader protection to materialmen and laborers ended the controversy once and for all. The question sought to be raised here has ceased to exist, except as between the parties to this litigation. Petitioners have failed to call attention to one single instance where the same question exists. No weighty or significant interest attaches here to create a reason for granting certiorari under subdivision 5(b) of Rule 38 of this Court.

Conclusion.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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